

KENDELL MURPHY §
v. § CIVIL ACTION NO. 6:10cv508
BARRY ANDREWS, ET AL. §

The Plaintiff Kendell Murphy, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

The Magistrate Judge conducted an evidentiary hearing on March 31, 2011. At this hearing and in his complaint, Murphy complained that he was the victim of retaliation by an officer named Barry Andrews, who routinely refused to feed him, provide him showers, or allow him to go to recreation. He complained to Andrews' direct superiors, Sgt. Cooper and Captain Danheim, as well as further up the chain of command, to Major Bowman and Warden Motal. Murphy said that he also named TDCJ Director Rick Thaler as a defendant, but that he did not intend to sue Thaler; rather, he believed that he had to name Thaler as a defendant for "notification purposes."

After the hearing, the Magistrate Judge issued a Preliminary Report recommending dismissal of the claims against Bowman and Motal, as well as Thaler. The Magistrate Judge concluded that Murphy's claim against Bowman was that the investigation conducted by the major did not arrive at the conclusion which Murphy thought appropriate, and that Motal did not respond to the letters and I-60 request forms which Murphy sent to him. Murphy conceded that he did not

know if Motal had received these letters or requests. The Magistrate Judge further recommended dismissal of Thaler based upon Murphy's statement that he did not intend to sue Thaler.

Murphy filed objections to the Magistrate Judge's Report on April 15, 2011. In his objections, Murphy asserts that he brought the situation to Major Bowman's attention, but the major failed to "take the necessary action by TDCJ policy and guidelines in conducting a thorough and proper investigation of the actual life endangerment complaint I filed against officials." He does not object to the dismissal of Warden Motal or Rick Thaler.

Murphy's objections simply confirm the Magistrate Judge's conclusion that Murphy's claim against Bowman concerns the inadequacy of the investigation which Bowman conducted, and the failure by Bowman to take the action which Murphy thought appropriate. The documents attached by Murphy to his complaint show that an investigation was done, and this investigation determined that Andrews denied refusing to feed or recreate Murphy, and the daily activity logs showed that Murphy was fed, recreated, and showered. Even if Bowman was negligent in failing to conduct a more thorough investigation, or erred by believing Andrews rather than Murphy, the plaintiff has offered nothing to show that Bowman was deliberately indifferent to his safety. *See Parker v. Currie*, 359 Fed.Appx. 488, 2010 WL 10924 (5th Cir., January 4, 2010) (no deliberate indifference where life endangerment claims were repeatedly investigated), *citing Domino v. Texas Department of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). Murphy's objections are without merit.

The Court has conducted a careful *de novo* review of the pleadings and testimony in this cause, together with the Report of the Magistrate Judge and the Plaintiff's objections thereto. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are overruled and the Preliminary Report of the Magistrate Judge (docket no. 28) is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the Plaintiff's claims against Major Bowman, Warden Motal, and TDCJ Director Rick Thaler are hereby DISMISSED with prejudice as frivolous and for failure to state a claim upon which relief may be granted. The dismissal of these claims and parties shall have no effect upon the remaining claims and parties in the case. It is further

ORDERED that the name of "Warden Suter" be deleted from the docket as having been docketed in error. Finally, it is

ORDERED that the dismissal of these claims and defendants shall not count as a strike for purposes of 28 U.S.C. §1915(g).

SIGNED this 6th day of May, 2011.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE